

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2077

Cir. Ct. No. 2011CV10581

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BLAINE E. GOLDNER,

PLAINTIFF-RESPONDENT,

V.

**AMERICAN CONCRETE LEVELING CORPORATION
D/B/A AMERICAN FOUNDATION SPECIALISTS,**

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. American Concrete Leveling Corporation appeals the judgment and order entered after a jury found that American Concrete owed

Blaine E. Goldner \$31,000 for unpaid wages and that Goldner did not breach his duty of loyalty to American Concrete when he helped a competitor by going to five or six customers' homes to give basement repair estimates because the competitor had a foot injury that prevented the competitor from doing the estimates. Post-trial, the circuit court granted Goldner's request for lawyer's fees and expenses, allowed under WIS. STAT. § 109.03(6), for prevailing on his wage claim, and ordered American Concrete to pay a \$5,000 penalty, under WIS. STAT. § 109.11(2)(a), for not paying Goldner's wages.¹ American Concrete challenges only the lawyer's fees and penalty that the trial court ordered, arguing: (1) the fees should have been limited to time spent on the wage claim; (2) the fees awarded should have been reduced for what it contends was the "substantial overtrial by Goldner"; and (3) the trial court should not have ordered American Concrete to pay a \$5,000 penalty. We affirm.

¹ WISCONSIN STAT. § 109.03(6) provides:

(6) WAGE CLAIM. In an action by an employee or the department against the employer on a wage claim, no security for payment of costs is required. In any such proceeding the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses. No person other than an employee or the department shall be benefited or otherwise affected by this subsection.

WISCONSIN STAT. § 109.11(2)(a) provides:

(2) CIVIL PENALTIES. (a) In a wage claim action that is commenced by an employee before the department has completed its investigation under s. 109.09(1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50% of the amount of wages due and unpaid.

I.

¶2 Goldner worked for American Concrete from May 2009 to March 17, 2011, as a foundation specialist. He evaluated basement problems and gave customers repair estimates. Goldner did not have a covenant not to compete or a written employment contract with American Concrete. American Concrete paid Goldner a set amount biweekly plus commissions, bonuses, and other benefits. The commissions did not get paid out immediately; rather, this money sat in Goldner's name with American Concrete until he asked the owner, Tony Zidar, for it. In January of 2011, Goldner asked Zidar to pay him the commissions he had earned because his wife needed a new car. According to Goldner, Zidar did not pay the commissions because of a purported cash-flow problem.

¶3 In February of 2011, Tony Zidar's brother, Bob Zidar, (who owned a competing basement repair company called Concrete Raising Corporation) asked Goldner to help write basement repair estimates that Bob Zidar had scheduled but could not do because of a foot injury. The Zidar brothers used to work in the basement repair business together but had a falling out in 1992 and, as we have seen, own separate companies. Goldner knew Bob Zidar because American Concrete used Bob Zidar's business occasionally to help with a particular kind of basement repair, and also knew him as they were both members of the Wisconsin Association of Foundation Repair Professionals, which met bimonthly. Goldner agreed to help Bob Zidar and went on five or six customer calls to give basement-repair estimates on Bob Zidar's behalf during the week of March 3–9, 2011. Goldner testified this did not affect his American Concrete job or business opportunities for American Concrete, that he did not reveal the confidences of either Zidar brother or their businesses, and did not divert any business from American Concrete to Concrete Raising. Concrete Raising did have Goldner sign

a confidentiality agreement that stopped him “from disclosing or sharing information related to [Concrete Raising]’s confidential business practices and customers,” but Goldner did not expect to get paid because he was simply “helping out.”

¶4 Tony Zidar fired Goldner on March 17, 2011, when he learned that Goldner was helping Concrete Raising. Bob Zidar then hired Goldner. Goldner asked American Concrete to send him his unpaid wages. When American Concrete refused, Goldner filed this lawsuit against American Concrete for breach of contract, unjust enrichment, promissory estoppel, and WIS. STAT. ch. 109 wage-claim violations. Goldner claimed American Concrete owed him more than \$29,342.65. American Concrete filed a counterclaim, arguing that Goldner had breached his common-law duty of loyalty and therefore had forfeited all unpaid wages.

¶5 As noted, the jury found in favor of Goldner. The special verdict provided:

QUESTION 1: Did American Concrete Leveling, doing business as American Foundation Specialists, breach Blaine Goldner’s employment contract by not paying wages and other compensation that was due and owing at the time his employment was terminated?

ANSWER: Yes (YES OR NO)

QUESTION 2: If you answered QUESTION 1 “yes”, then answer this question: What sum of money will fairly and reasonably compensate Blaine Goldner for the damage caused by that breach?

ANSWER: \$31,000.- (AMOUNT)

QUESTION 3: REGARDLESS OF YOUR ANSWERS TO ANY PREVIOUS QUESTION, ANSWER THIS QUESTION: Did Blaine Goldner breach his duty of

loyalty to American Foundation Specialist while employed by AFS?

ANSWER: No (YES OR NO)

¶6 After trial, Goldner asked the trial court for “costs, expenses, reasonable attorneys’ fees and statutory penalty” under WIS. STAT. § 109.03(6) (“In any such proceeding the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses.”); *Jacobson v. American Tool Companies, Inc.*, 222 Wis. 2d 384, 398–402, 588 N.W.2d 67, 73–75 (Ct. App. 1998) (“expenses” in § 109.03(6) includes lawyer’s fees), and asked the trial court to award a \$15,500 penalty under WIS. STAT. § 109.11(2)(a) (“a circuit court may order the employer to pay the employee, in addition to the amount of wages due and unpaid ... increased wages of not more than 50% of the amount of wages due and unpaid”). Along with the motion, Goldner’s lawyer submitted her detailed time records and asserted that the hourly rate for her firm was \$250/hour for partner time; \$225/hour for associate time, and \$85/hour for paralegal time. The submission was fifteen pages long, listing the dates of service, a detailed description of the service, how much time was spent, the charge, and who did the work. The trial court granted the motion finding:

- This case “had a singular factual premise: American Concrete Leveling, dba American Foundation Specialists, failed to pay wages and other employment compensation that was earned by Mr. Goldner. In like measure, American Concrete denied the claim, defended this matter and interposed a counterclaim almost exclusively on a singular factual (and legal) premise: Mr. Goldner had breached his duty of loyalty to his employer and thereby

forfeit[ed] any right to compensation claimed in this lawsuit. The jury accepted the plaintiff's and rejected the defendant's premise."

- It was "impossible" or "impractical" to separate out what lawyer fees went solely to the wage claim as opposed to the defense of the disloyalty counterclaim.
- Goldner "is entitled to recover reasonable attorneys' fees and expenses incurred in successfully prosecuting this wage claim" under WIS. STAT. § 109.03(6).
- Applying the "lodestar" approach in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58, that (1) the legal issues were "not particularly novel"; (2) "extensive time and effort was necessitated to successfully prosecute the claim"; (3) Goldner's lawyers "performed in a highly competent and professional manner, as evidenced by the wholly successful result achieved"; (4) Goldner "is more than satisfied with the quality of the representation"; (5) "the affidavits submitted, together with my own knowledge of the rates for legal services in this community establish that the hourly rate charged was very reasonable"; (6) the case was not over-litigated but the "large expenditures of time were dedicated to issues devolving from delays and failures to meet discovery obligations" and this was due to the "obstinate behavior" and "emotionality that exists between the principals of American Foundation" and Concrete Raising; and (7) the "disproportionality between the actual damages recovered and the amount of fees and expenses" "are not unreasonable."

- “[A] penalty of \$5000.00 is fair and reasonable” “pursuant to 109.11(2)(a)” because “the actions of American Concrete Leveling were far more motivated by irrational emotionality than a sincere belief that the wages were not due.”
- American Concrete should pay Goldner’s lawyer’s fees and costs of \$85,021.03.

As noted, American Concrete appeals only the lawyer’s fees and penalty.

II.

¶7 A trial court’s decision on lawyer’s fees under a fee-shifting statute is discretionary and will be upheld on appeal unless the trial court erroneously exercised its discretion. *Kolupar*, 2004 WI 112, ¶22, 275 Wis. 2d at 15, 683 N.W.2d at 65–66. The trial court must start with the “lodestar” analysis: “the product of reasonable hours multiplied by a reasonable rate.” *Id.*, 2004 WI 112, ¶29, 275 Wis. 2d at 18–19, 683 N.W.2d at 67. After the trial court makes the lodestar assessment it “may adjust this lodestar figure up or down” for other factors pertinent to the case not included in the lodestar analysis. *Id.*, 2004 WI 112, ¶29, 275 Wis. 2d at 19, 683 N.W.2d at 67. Factors to consider in determining reasonableness are: “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers

performing the services, and (8) whether the fee is fixed or contingent.” SCR 20:1.5(a).

¶8 As we have seen, the trial court here started with the lodestar approach and examined all the pertinent factors. The trial court did not erroneously exercise its discretion. American Concrete complains that the trial court should have reduced the award to cover only costs linked to Goldner’s wage claim and for costs resulting from what it claims was a “substantial overtrial” of the case. It also argues that a \$5,000 penalty should not have been imposed because American Concrete “had legitimate reasons for withholding payment.” We reject each contention in turn.

A. *Paying only fees linked to the wage claim.*

¶9 American Concrete contends that the trial court erred when it did not reduce the lawyer’s fees to separate out any amounts not linked directly to the wage claim. It argues that the wage claim and the disloyalty counterclaim had different “operative facts” and “distinct legal theories,” and, therefore, Goldner should only get fees for the wage claim and not for any work done in connection with the counterclaim. American Concrete also argues that the wage-claim fees could have been separated from the disloyalty-counterclaim fees if Goldner’s lawyer had “submit[ted] an itemized breakdown” of her fees.

¶10 As we have seen, however, the trial court found that both the wage claim and the disloyalty counterclaim had singular factual premises: both were based on American Concrete’s refusal to pay Goldner the wages he was due. It further found that trying to separate fees for the work done on wage claim from the work done on the counterclaim would be “impossible” and “impractical.” Goldner’s lawyer gave the trial court an itemized and very specific accounting of

the time spent on the case. Given the trial court’s findings, which are supported by the Record, separating the wage claim fees from the counterclaim fees was not possible. Indeed, in order to *prove* his wage claim, Goldner had to *negate* American Concrete’s counterclaim—the two, as the trial court recognized, were inextricably intertwined. The trial court did not erroneously exercise its discretion in awarding the lawyer’s fees as required by WIS. STAT. § 109.03(6). *See Southeast Wisconsin Professional Baseball Park District v. Mitsubishi Heavy Industries America, Inc.*, 2007 WI App 185, ¶49, 304 Wis. 2d 637, 680–681, 738 N.W.2d 87, 109 (lawyer’s fees authorized when two claims are “‘inextricably intertwined.’”) (quoted source omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (lawyer’s fees authorized when claims “involve a common core of facts” because lawyer’s “time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis”).²

B. *Reduction of fees for alleged “substantial overtrial.”*

¶11 American Concrete also claims the trial court should have reduced the fees award because Goldner “substantially overtried” the case. This contention appears to be based on American Concrete’s contention that Goldner asked for discovery when he did not really need it:

When Goldner commenced this litigation, he alleged that he was owed \$29,342.65. His claim was based on the handwritten commission log which he had in his possession. His check stubs provided him with the amount

² American Concrete’s additional arguments in this section of its brief—that the award exceeded the scope of Chapter 109’s authority, conflicted with “Frivolity Law,” and violated due process—are without merit, borderline-frivolous, and we do not address them further. *See State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

American Concrete had paid him. Despite having the information necessary to prove his claim, Goldner nevertheless insisted that American Concrete produce all documents in any way related to jobs, contracts, and/or customers that Goldner had contact with and/or dealings with during his employment at American Concrete.

(Record cites omitted.)

¶12 The trial court addressed the extensive discovery disputes and attributed the lengthy discovery problems to the “obstinate behavior” and “emotionality that exists between the principals of American Foundation” and Concrete Raising. In other words, the trial court found that the problems resulted from the animosity between the Zidar brothers, not because Goldner “overtried” the case. This finding is not “clearly erroneous.” *See* WIS. STAT. RULE 805.17(2) (circuit court’s findings of fact must be upheld on appeal unless “clearly erroneous”); *see also* WIS. STAT. § 804.01(2)(a) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...”); ***Sands v. Whitnall School Dist.***, 2008 WI 89, ¶18, 312 Wis. 2d 1, 14–15, 754 N.W.2d 439, 445 (“The right to discovery is an essential element of our adversary system.”).

C. \$5,000 penalty.

¶13 Finally, American Concrete argues the trial court erred in imposing the \$5,000 penalty under WIS. STAT. § 109.11(2)(a). It contends that it had a legitimate reason to withhold wages—the assertions underlying its disloyalty counterclaim—and, therefore, it should not be penalized. We disagree.

¶14 First, as we have seen, the trial court could have imposed a \$15,500 penalty. It did not. Rather, after assessing the situation, the trial court set the penalty at \$5,000. It found that the counterclaim arose from “irrational

emotionality” rather than a “sincere belief that the wages were not due,” and also found that the jury’s rejection of the disloyalty counterclaim refuted American Concrete’s position that it had a legitimate reason to withhold wages. The trial court’s findings are supported by credible evidence and its decision is reasonable; it did not erroneously exercise its discretion.

III.

¶15 Goldner asks for lawyer’s fees under WIS. STAT. § 109.03(6) for having to defend this appeal. This is what the law provides. *See Benkowski v. Flood*, 2001 WI App 84, ¶38, 242 Wis. 2d 652, 675, 626 N.W.2d 851, 862 (“[A] plaintiff who recovers attorney fees at the trial court level shall recover further attorney fees incurred on a successful defense of the award on appeal.”). Accordingly, we remand this matter to the trial court to determine the amount of reasonable fees that Goldner incurred in defending this appeal.

By the Court.—Judgment and order affirmed and cause remanded with directions.

Publication in the official reports is not recommended.

